

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD M. CHAPPELL

Claimant

V.

SUGAR CREEK PACKING CO.

Self-Insured Respondent

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Docket No. 1,068,774

ORDER

Self-insured respondent requests review of Administrative Law Judge Brad E. Avery's April 1, 2014 preliminary hearing Order for Compensation. Kala Spigarelli of Pittsburg, Kansas, appeared for claimant. Karl Wenger of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the judge.

ISSUES

Claimant sustained an accidental injury which arose out of and in the course of his employment on January 18, 2014. The judge concluded claimant was not fired for cause. The judge ordered payment of temporary total disability benefits (TTD).

Respondent argues the judge exceeded his authority in granting TTD because claimant was terminated for cause and it would have kept providing him work within the authorized treating physician's restrictions. Claimant argues the Order should be affirmed.

The only issue for determination is whether the Board has jurisdiction to address whether the judge exceeded his jurisdiction in awarding TTD if respondent was able to accommodate the restrictions from the authorized treating physician.

FINDINGS OF FACT

Respondent hired claimant on January 16, 2014. Claimant incurred a work-related injury on January 18, 2014 when a high pressure hose "whipped like a snake" and hit him between his temple and his eye.¹ Thereafter, claimant obtained medical treatment. Claimant returned to work with restrictions. He missed work for reasons disputed by the parties. Based on claimant's work attendance, respondent terminated his employment on February 12, 2014. Geri Vincent, a manager who handles workers compensation for respondent, testified claimant's restrictions from an authorized treating physician would have continued to be accommodated, but for claimant's termination.

¹ P.H. Trans. at 6-7.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-510c(b)(2)(C)states:

If the employee has been terminated for cause . . . following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

K.S.A. 2013 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2013 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2013 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. K.S.A. 44-534a also specifically gives the judge authority to grant or deny the request for TTD compensation pending a full hearing on the claim. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."²

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and issues listed in K.S.A. 2013 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.³

ANALYSIS

Claimant did not raise jurisdiction as an issue, but such omission does not expand the Board's statutorily-limited jurisdiction.⁴

The judge did not exceed his jurisdiction in determining payment of TTD was appropriate for what is otherwise a compensable injury. Such authority includes the possibility he decided the matter wrong. Whether a claimant was terminated for cause, and is thus not entitled to TTD benefits, is not a jurisdictional issue listed in K.S.A. 2013 Supp. 44-534a(a)(2). All five Board Members agree this issue is not one over which the Board takes jurisdiction in an appeal of a preliminary order. "Since the review requested by claimant does not raise an issue of compensability enumerated in K.S.A. 2013 Supp. 44-534a(a)(2), and there has been no showing the ALJ exceeded his authority, the application for Board review must be dismissed for lack of jurisdiction."⁵

CONCLUSIONS

The Board does not have jurisdiction to hear the self-insured respondent's appeal. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁶ Accordingly, the appeal is dismissed.

³ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁴ "[S]ubject matter jurisdiction is a question that may be raised at any time, whether for the first time on appeal or even on an appellate court's own motion." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 166, 210 P.3d 105 (2009). See also *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014).

⁵ *Willis v. Clearview City*, No. 1,067,116, 2014 WL 1340598 (Kan. WCAB Mar. 24, 2014); see also *Ramirez v. Murfin Drilling Co., Inc.*, No. 1,061,372, 2014 WL 889872 (Kan. WCAB Feb. 10, 2014); *Beaver v. Spangles*, No. 1,067,204, 2014 WL 517253 (Kan. WCAB Jan. 16, 2014); and *Dominguez-Rodriguez v. Amarr Garage Doors*, No. 1,058,613, 2012 WL 1652979 (Kan. WCAB Apr. 24, 2012).

⁶ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

WHEREFORE, the appeal of the Order is dismissed.⁷

IT IS SO ORDERED.

Dated this _____ day of June 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
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Karl Wenger, Attorney for Respondent
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Honorable Brad E. Avery

⁷ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.